IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
(ST. JOSEPH DIVISION)

RIGHTCHOICE MANAGED CARE INC., *et al.*,	)	
	)	CIVIL ACTION NO.:
Plaintiffs,	)	
	)	5:18-cv-06037-DGK
v.	)	
HOSPITAL PARTNERS INC., *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS', HOSPITAL PARTNERS, INC., EMPOWER H.I.S., LLC, DAVID BYRNS AND JORGE PEREZ'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT

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INTRODUCTION

This memorandum of law is submitted in support of the motion by Defendants Hospital Partners, Inc., Empower H.I.S., LLC, David Byrns and Jorge Perez (collectively herein, "Defendants") for an Order dismissing this matter pursuant to Fed. R. Civ. P. 12(b)(2), Fed. R. Civ. P. 12(b)(3), Fed. R. Civ. P. 12(b)(6), for relief pursuant to Fed. R. Civ. P. 12(b)(7) under Fed. R. Civ. P. 19, and/or for a more definite statement pursuant to Fed. R. Civ. P. 12(e).

PROCEDURAL STATEMENT

The Complaint currently at issue in this matter is the Third Amended Complaint, which was filed on July 17, 2018 [Doc. #57]. Defendants have until August 16, 2018 to respond to the Third Amended Complaint (herein, "Complaint") [Doc. #69].

THE COMPLAINT

The Complaint is seventy-seven (77) pages long (plus exhibits) and contains three hundred thirty-two (332) numbered paragraphs, two hundred twenty-nine (229) paragraphs of which are underlying factual allegations, and nine (9) Counts for relief. The Counts as alleged are: Count I – Fraud and Fraudulent Concealment (All Defendants); Count II – Negligent Misrepresentation (All Defendants); Count III – Restitution under ERISA § 502(a)(3) (All Defendants); Count IV – Declaratory and Injunctive Relief Under ERISA § 502(a)(3) and 28 USC §2201 and §2202 (All Defendants); Count V – Tortious Interference with Contract (All Defendants); Count VI – Civil Conspiracy (All Defendants); Count VII – Aiding and Abetting a Tort (All Defendants); Count VIII – Unjust Enrichment (All Defendants); and Count IX – Money Had and Received (All Defendants).

There is a single prayer for relief at the end of the Complaint, but the *ad damnum* clause fails to identify in all cases, from who damages are sought, or to what count, the relief is directed.

STANDARD OF REVIEW – JURISDICTION AND VENUE

The Complaint [Doc. # 57] provides that the basis for jurisdiction and venue are: federal question pursuant to 28 U.S.C. § 1331 (¶ 23); supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (¶ 24); and venue pursuant to 28 U.S.C. § 1391(b)(2) (¶ 25). The standard of review on a Fed. R. Civ. P. 12(b)(2) motion is well-established and directly implicates the state (Missouri, in this case) long-arm statute:

> In order for a non-resident defendant to be subject to the long-arm jurisdiction of this state, two elements must be present: First, the suit must arise out of one of the activities enumerated in Missouri's long-arm statute; and second, the defendant must have sufficient minimum contacts with Missouri to satisfy due process requirements. *Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 4 (Mo. banc 1997). When a defendant raises the issue of lack of personal jurisdiction, the burden shifts to the plaintiff to make a *prima facie* showing that those two elements exist.

Hollinger v. Sifers, 122 S.W.3d 112, 115 (Mo. App. 2003). Although unclear, it appears Plaintiffs are using the "tortious act" provision of the Missouri long-arm statute: "In order to rely upon the 'tortious act' provision of the long arm statute, the Plaintiffs were required to show that the Defendants committed a tort in Missouri and that the action caused the Plaintiffs' injuries." *Id.* at 116. (quotation marks and citation omitted). The Missouri long-arm statute is instructive:

> § 506.500. Actions in which outstate service is authorized—jurisdiction of Missouri courts applicable, when
> 1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:
> (1) The transaction of any business within this state;
> (2) The making of any contract within this state;
> (3) The commission of a tortious act within this state;
> (4) The ownership, use, or possession of any real estate situated in this state;
> (5) The contracting to insure any person, property or risk located within this state at the time of contracting;
> …

> 3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

§ 506.500, RSMo (LexisNexis, Lexis Advance through all legislation approved as of April 9, 2018).

On a Fed. R. Civ. P. 12(b)(2) motion, due process is also an issue. "Nonresident defendants must have certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Tiger Mfg. Corp. v. Loadstar Material Handling Equip., Ltd.*, 341 F. Supp. 2d 1107, 1111 (W.D. Mo. 2004). Sufficient contacts exist when "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* (quotation marks and citation omitted). The standard for "minimum contacts" has devolved into a consideration of five factors:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties.

Id. The Complaint is unclear as to exactly what "federal question" is posed as to these Defendants; at a minimum, Plaintiffs must explain as to each of these Defendants, what Federal violation has been alleged, and further, why Missouri has jurisdiction. The applicable venue provision is 28 U.S.C. § 1391:

> 1391. Venue generally
> (b) Venue in general. A civil action may be brought in--
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C.S. § 1391 (LexisNexis, Lexis Advance through PL 115-108, approved 1/8/18, with gaps of PL's 115-91 and 115-97).

As set forth above, it is entirely unclear not only what wrongdoing is alleged against each of these Defendants, but **where** such wrongdoing is alleged to have occurred. It is also unclear as to the connections of these Defendants to Missouri. Without this information, venue has not been appropriately pled and established. The lack of explanation is particularly glaring as to the individuals, as it is entirely unclear as to why they are "individually" named and what they did individually.

The Complaint is defective as to the pleading of both jurisdiction and venue and must be dismissed.

STANDARD OF REVIEW – FAILURE TO NAME INDISPENSIBLE PARTIES

It is clear that Putnam County, Putnam County Memorial Hospital and/or the Putnam County Memorial Hospital Board of Trustees are indispensable parties under Fed. R. Civ. P. 19. Under Rule 19, a party must be joined as a party if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
> (2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
> ….

Fed. R. Civ. P. 19(a)(1)-(2). The Complaint [Doc. #57] alleges in paragraph 3 that Defendant Hospital Partners, Inc. entered into a contract with the "Putnam Board" and "Putnam,"

neither of which is a party to this action, but through which appear to be Plaintiffs' only contact with Defendants. Further, throughout the Complaint, "Putnam" is alleged to have perpetrated wrongdoing; how could this case proceed without Putnam County, Putnam County Memorial Hospital and/or the Putnam County Memorial Hospital Board of Trustees?

In addition, although unclear at this time, it appears that if Putnam County, Putnam County Memorial Hospital and/or the Putnam County Memorial Hospital Board of Trustees are required to pay any monies to Plaintiffs (or if any Defendants are required to pay any monies to Plaintiffs), then the contracts between Putnam and Defendants will be affected and, accordingly, all affected parties need to be present herein for complete adjudication.

Further troubling, Plaintiffs have completely avoided the issue that if Plaintiffs are granted relief, each of the ultimate patients (who received a service), would then become liable to Putnam or one or more of the Defendants under various contract and quasi-contract theories. How could this case proceed and potentially establish liability against the ultimate patients, and in favor of Putnam or one or more of the Defendants, without such ultimate patients being a party herein?

STANDARD OF REVIEW – FAILURE TO STATE A CAUSE OF ACTION

The standard of review on a Fed. R. Civ. P. 12(b)(6) motion is well-established. While specific facts are not necessary, the statement of the claim must "give the defendant fair notice of what the…claim is and the grounds upon which it rests." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation marks and citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* It is not enough to plead conclusions of law without the underlying facts. "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not

entitled to the assumption of truth." *Id.* at 679.

"While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft*, 556 U.S. at 679. "Formulaic" factual allegations do not suffice. *Davis v. Bd. of Trs. of N. Kan. City Hosp.*, No. 14-0625-CV-W-ODS, 2015 U.S. Dist. LEXIS 24427, at *4-6 (W.D. Mo. Mar. 2, 2015). "[T]he Court must be wary of vague or indeterminate facts that require additional factual enhancement…." *Id.* (quotation marks and citation omitted).

Under the above standard of review, as is more particularly shown below, the Complaint fails and must be dismissed in its entirety.

ARGUMENT

POINT I – The Complaint Fails to Properly Plead Jurisdiction and Venue.

As stated in the "Standard of Review – Jurisdiction and Venue" section above, the Complaint has not properly set forth the basis for jurisdiction and venue on its face and must be dismissed.

POINT II – The Complaint Fails Under the Parameters of Fed. R. Civ. P. 19.

As stated in the "Standard of Review – Failure to Name Indispensable Parties" section above, the Complaint has not named indispensable parties and must be dismissed. The Complaint also references an Exhibit that is a contract between Putnam County Memorial Hospital and Plaintiff RightCHOICE (Doc. #57, ¶¶ 86 through 102). Inexplicably, **none** of Putnam County, Putnam County Memorial Hospital or the Putnam County Memorial Hospital Board of Trustees is named as a party to the Complaint. It is simply inconceivable that Putnam County, Putnam County Memorial Hospital and/or the Putnam County Memorial Hospital Board of Trustees are not

indispensable parties under the allegations of the Complaint, as they would have necessarily been the wrongdoers, or would have been the party in privity with the Plaintiffs, and the party employing any of the "subservient" alleged wrongdoers.

It is clear that Putnam County, Putnam County Memorial Hospital or the Putnam County Memorial Hospital Board of Trustees are indispensable parties under Fed. R. Civ. P. 19:

> Rule 19. Required Joinder of Parties
>
> (a) Persons Required to Be Joined if Feasible.
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.
> (2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.
> ….

Fed. R. Civ. P. 19. Further, as noted above, it appears that any adjudication herein would also adjudicate the rights of the ultimate patients, who would necessarily be indispensable parties. Each of Putnam County, Putnam County Memorial Hospital and/or the Putnam County Memorial Hospital Board of Trustees, as well as the ultimate patients, are indispensable parties.

> F.R. Civ. P. Rule 19 requires joinder of parties (1) if in their absence "complete relief cannot be accorded among those already parties, or (2) [the party] claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in his absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." MFA Mutual and the defendants Mackey and Hale obviously meet these requirements and their joinder is mandatory under the pragmatic tests of Rule 19 which govern this determination.

> Cf. *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102, 88 S. Ct. 733, 19 L. Ed. 2d 936, under which at least both MFA Mutual and Mackey must be regarded as indispensable, and Wright, Law of Federal Courts, 2d Ed., at pages 299-302. Therefore, none of them could be dropped to create diversity jurisdiction.

Mission Ins. Co. v. Mackey, 340 F. Supp. 824, 829 (W.D. Mo. 1971). By way of example, if Plaintiffs were to recover from Defendants, then Putnam County, Putnam County Memorial Hospital, the Putnam County Memorial Hospital Board of Trustees and/or the ultimate patients would have been adjudicated liable to one or more of the Defendants for the services they each received.

The simple fact that all of these entities and individuals will be necessarily affected by any relief afforded to Plaintiffs makes them indispensable parties.

POINT III – The Complaint Fails Under the Parameters of Fed. R. Civ. P. 8.

The Complaint impermissibly "lumps" the Defendants together. "[B]y merely lumping these defendants into an undifferentiated mass without providing a factual basis to distinguish their conduct, plaintiff has failed to give any named defendant fair notice of the grounds for the claims made against him or her…." *Crawford v. Austin*, No. 2:17-cv-45-JMB, 2018 U.S. Dist. LEXIS 82093, at *6-7 (E.D. Mo. May 16, 2018). Lumping the Defendants together violates the "fair notice" requirements, and this Court has held that "[t]his practice results in a pleading that fails to comply with Rule 8(a) of the Federal Rules of Civil Procedure." *Allen v. Echele*, No. 4:18-cv-155-JAR, 2018 U.S. Dist. LEXIS 82959, at *7 (E.D. Mo. May 17, 2018).

If necessary to properly apprise each Defendant, Plaintiffs must plead separate sets of facts for each Defendant:

> The Court agrees with defendants that plaintiffs' sixth amended petition is not pled with sufficient particularity. The use of "and/or" phraseology and lumping of all defendants together into one category results in the reader [*41] being unable to determine the exact theory of liability as to each separate defendant. Although plaintiffs complain that they would have to assert 50 separate sets of allegations as

> to each defendant, the Court believes that this may be necessary under the facts of this case.

Wong v. Bann-Cor Mortg., No. 10-1038-CV-W-FJG, 2011 U.S. Dist. LEXIS 61548, at *40-41 (W.D. Mo. June 9, 2011). One of the seminal cases on this issue may be persuasive to this Court:

> Although Fed. R. Civ. P. 8 does not demand that a complaint be a model of clarity or exhaustively present the facts alleged, it requires, at a minimum, that a complaint give each defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests." *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961); *see also Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995). By lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, Atuahene's complaint failed to satisfy this minimum standard…Consequently, the district court did not abuse its discretion in dismissing the complaint. *See Simmons*, 49 F.3d at 87.

Atuahene v. City of Hartford, 10 F. App'x 33, 34 (2d Cir. 2001).

As pertains to these Defendants, **nowhere** in the Complaint are these Defendants individually alleged to have perpetrated any wrongdoing; in each case, these Defendants are alleged as one of a group of defendants who are all simultaneously alleged to have done wrong. Notably, in the only substantive paragraphs in which Defendants are individually addressed (in Count I, Doc. #57, ¶ 234), the subparagraphs are virtually a "copy and paste" of the claims against the other defendants. Further vexing is that the individual Defendants are noted, without explanation as to the ability to sue an "employee" or to "pierce the veil," to the extent one of Defendants' entities is alleged as an independent contractor.

In each substantive allegation that mentions Defendants, the Complaint groups the defendants in various capacities and fails to differentiate (where multiple defendants are grouped), which Defendant was responsible for what alleged action (or inaction). Throughout the Complaint, all of the various Counts are pled against all Defendants, and in many cases, merely provide a "formulaic recitation of the elements of a cause of action."

Each Defendant is entitled to know specifically what conduct it/he/she is alleged to have

done; it is not enough to merely lump the "defendants" together. There are now fourteen (14) Defendants in this action, and with the exception of noting which individuals may be related to a particular entity, no explanation of the legal relationship between the defendant individuals and entities is provided with any certainty. Further glaring is Plaintiffs' failure to identify how they reached their assumption that they can simply sue individuals, thereby "piercing the veil," as such theme is generally woven into the Complaint. Plaintiffs allege they had a relationship with Putnam, and, thereafter, Putnam had a relationship with various of the entity defendants. Each of the individuals is connected to one or more of the subject entities, but it is unclear as to why the individuals have liability beyond that of the Defendant entities.

Finally, Plaintiffs fail to explain how they can act as "joint" Plaintiffs, and, other than in the initial paragraphs of the Complaint, do not at all differentiate between any individual Plaintiffs – neither in any factual allegations nor in any relief sought. Are they simply one big entity, and both liability and the claims are "joint and several?" At a minimum, Plaintiffs must differentiate between the respective Plaintiffs and the respective Defendants as to any factual allegations or relief sought. Until that is done, the Complaint must be dismissed.

It is also noted that many of the Plaintiffs are in other states; how is Missouri proper venue for those claims?

POINT IV – Failure to Address Conditions Precedent.

Federal Rule of Civil Procedure 9(c) requires conditions precedent to be addressed in the Complaint. Plaintiffs have utterly failed to address conditions precedent in the Complaint. Notably, the Exhibits attached to the Complaint seem to indicate certain pre-suit requirements; in most cases, pre-suit conferral or ADR.

The failure to address conditions precedent requires the Complaint to be dismissed.

POINT V – The Complaint Fails to Allege "Specificity" Required for Fraud.

Counts I and II are for Fraud and Negligent Misrepresentation. Pleading fraud requires "specificity." "Plaintiffs' non-specific reference to 'Defendants' as a collective group does not obviate their obligation to plead facts that would plausibly impose liability on each Defendant individually. This leads to the final infirmity with Count III: it lacks sufficient detail. Count III is couched in terms of fraud, which triggers the heightened pleading requirements of Rule 9." *Smith v. Bank of Am., N.A.*, No. 13-0333-CV-W-ODS, 2013 U.S. Dist. LEXIS 125248, at *12-14 (W.D. Mo. Sep. 3, 2013).

Plaintiffs also make the mistake of incorporating all of the prior paragraphs of the Complaint into each of the later Counts, using the underlying allegations of "fraud" as a fundamental element of the later Counts. This method of pleading by Plaintiffs requires each of the Counts in the Complaint to be held to the same heightened standard of pleading. As Plaintiffs have failed to allege the requisite specificity anywhere in the Complaint, the entire Complaint must be dismissed. Further, specifically as to the Fraud and Negligent Misrepresentation Counts, the elements of the Counts themselves are not set forth with specificity as to each Defendant.

The standard recitations of "who, what, where and when," as to each Defendant are simply absent from the Complaint.

POINT VI – Counts III, IV, V, VI and VII.

Count III is Restitution under ERISA § 502(a)(3), Count IV is Declaratory and Injunctive Relief Under ERISA § 502(a)(3) and 28 U.S.C. § 2201 and § 2202, Count V is Tortious Interference with Contract, Count VI is Civil Conspiracy and Count VII is Aiding and Abetting a Tort. None of these Counts are independent – they each rely on the survival of the Fraud Count to survive.

Each of these Counts merely seeks relief without further justification other than the predetermination of Fraud by all Defendants. Accordingly, all six (6) Counts must be dismissed, predicated on all of the above arguments.

POINT VII –Unjust Enrichment Count and Money Had and Received Count.

Count VIII indicates it is for "Unjust Enrichment" and Count IX indicates it is for Money Had and Received. No facts are set forth as to the individual Defendants – merely a formulaic recitation of the elements of the cause, and then as to all defendants. Not only are the Counts not properly pled, but it is unclear how unjust enrichment is allowed where there are express contracts attached to the Complaint.

Further, each Defendant must be informed as to the specific benefit or money they are **each** alleged to have received. Plaintiff has failed to plead these necessary requirements, and Counts VIII and IX must be dismissed.

POINT VIII – Economic Loss Rule

Interestingly, Plaintiffs seem to be alleging fraud in the performance throughout the Complaint. If the alleged tortious conduct was governed under any contract, then such conduct is relegated to an action in contract, and the tort claim fails. It would seem that Plaintiffs (to the extent they are parties to any contracts) are relegated to contract claims only. Missouri's economic loss rule "prohibits a cause of action in tort where the losses are purely economic." *Four Seasons Grp., Inc. v. Thyssenkrupp Elevator Corp.*, No. 2:10-CV-C-04004-NKL, 2010 U.S. Dist. LEXIS 38260, at *3-5 (W.D. Mo. Apr. 19, 2010) (citation omitted).

> Under Missouri law, "Recovery in tort is limited to cases in which there has been personal injury or property damage either to property other than the property sold, or to the property sold when it is rendered useless by some violent occurrence." ....So, under the economic loss rule, purchasers may not pursue tort claims for damage to the purchased items alone. *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. 1986) (en banc) (holding that a

> purchaser of a crane could not sue the seller for damage to the crane itself). Missouri courts have reasoned that contractual warranty claims provide those purchasers with an adequate remedy. *See Crowder v. Vandendeale*, 564 S.W.2d 879, 884 (Mo. 1978) (en banc) (holding that a homeowner could not sue the homebuilder in tort for poor construction of the home).

Id.

Accordingly, all of the tort claims, which are ultimately found to have occurred under any contract, are barred. The specific Counts to which this is directed is unknown at this time, as the timing/location and contractual involvement of the alleged wrongdoing is unclear in the Complaint.

POINT IX - At a Minimum, A More Definite Statement Should Be Ordered.

Alternatively, Defendants seek a More Definite Statement under Fed. R. Civ. P. 12(e) for Plaintiffs to identify the acts complained of **against each Defendant**. At a minimum, the Complaint needs to be "cleaned up" by Plaintiffs.

CONCLUSION

WHEREFORE, Defendants Hospital Partners, Inc., Empower H.I.S., LLC, David Byrns and Jorge Perez respectfully request an Order dismissing this matter pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(3), or 12(b)(6), for relief under Fed. R. Civ. P. 19, and/or for a more definite statement pursuant to Fed. R. Civ. P. 12(e), together with such other, further and different relief as the Court deems just, proper and equitable under the circumstances.

Respectfully submitted this 14th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's ECF system to:

ALL COUNSEL OF RECORD

This 14th day of August, 2018.

/s/ Lauren A. Horsman